No. 13727

In the United States Court of Appeals for the Ninth Circuit

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA,
PETITIONER

v.

CIVIL AERONAUTICS BOARD AND AIRBORNE FLOWER AND FREIGHT TRAFFIC, INC., RESPONDENTS

BRIEF FOR THE RESPONDENT CIVIL AERONAUTICS BOARD

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JURISDICTIONAL STATEMENT

The jurisdiction of the Civil Aeronautics Board to issue the orders under review rests on Sections 205, 401, and 1002 of the Civil Aeronautics Act of 1938, 52 Stat. 973, as amended, 49 U. S. C. 401 et seq., and was invoked upon the Board's own initiative (R. 3), and by a complaint filed by the respondent Airborne Flower and Freight Traffic, Inc. (See Tr. 40.)[1] The jurisdiction of this Court to review these orders rests on Section 1006 of the Act (52 Stat. 1024, 49 U. S. C. 646), and was invoked by a motion made and granted for leave to file a petition for review out of time after

[1] The reference Tr. is to the unprinted transcript of record herein, and the reference R. is to the printed transcript of record. It has been stipulated by the parties to the case, with the Court's approval, that the exhibits in the Board's proceeding, which were not printed, may be referred to on brief as if printed (R. 424).

an earlier petition for review had been dismissed for want of timely filing. *Consolidated Flower Shipments, Inc.—Bay Area* v. *Civil Aeronautics Board,* 205 F. 2d 449 (R. 421).

COUNTERSTATEMENT OF THE CASE

Petitioner is a so-called "nonprofit" organization engaged in the consolidation and shipment by air freight of flowers and decorative greens on behalf of its membership from the San Francisco area to eastern markets, and on behalf of the members' consignees. Its activities have been determined by the Board to constitute air transportation operations requiring appropriate authority from the Board under the provisions of the Civil Aeronautics Act. Although it could obtain a license from the Board as an air freight forwarder, petitioner has elected not to do so. It seeks review of a Board order (R. 389) directing it to cease and desist from engaging in unauthorized air transportation, and of a subsequent Board order (R. 396) refusing to stay the effectiveness of the cease and desist order until after the completion of Board proceedings in a general investigation which encompasses, *inter alia,* the question of whether special exemption should be granted from the Act for forwarding activities such as those conducted by petitioner. For a full understanding of the Board's orders and the positions of the parties, it is necessary briefly to review the statutory basis and the factual background of the Board's proceedings and actions.

Section 1 (2) of the Civil Aeronautics Act (*infra,* p. 37) defines an "air carrier" as one "who under-

takes, whether directly or indirectly or by lease or any other arrangement, to engage in air transportation." "Air transportation" in turn is defined in part (sections 1 (10) and 1 (21), *infra,* p. 37) as the "carriage by aircraft of persons or property as a common carrier for compensation or hire * * *." Under these definitions, air carriers include not only those persons who operate aircraft, but also those "indirect" air carriers who undertake to perform or provide common carrier transportation services through the use of the services of the direct air carriers. In short, express companies, freight forwarders, and other common carrier service organizations are included within the coverage of the Act.[2]

Section 401 (a) (*infra,* p. 38) prohibits air carrier operations in the absence of a certificate of public convenience and necessity issued by the Board after public hearing. However, Section 1 (2) also provides "[t]hat the Board may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest" (*infra,* p. 37). Pursuant to this proviso, the Board in 1948 promulgated a regulation (14 C. F. R. 296) which exempts "air freight forwarders" as defined therein from the provisions of Section 401 (a). *Air Freight Forwarder*

[2] See *National Air Freight Forwarding Corp.* v. *Civil Aeronautics Board*, 90 U. S. App. D. C. 330, 197 F. 2d 384 (1952); *American Airlines* v. *Civil Aeronautics Board*, 178 F. 2d 903 (C. A. 7, 1949); *Railway Express Agency, Grandfather Certificate*, 2 C. A. B. 531 (1941); *Universal Air, Investigation of Forwarding Activities*, 3 C. A. B. 698 (1942).

case, 9 C. A. B. 473 (1948), affirmed, *American Airlines* v. *Civil Aeronautics Board,* 178 F. 2d 903 (C. A. 7, 1949). Persons desiring to avail themselves of the exemption privilege are required to make application to the Board for a "Letter of Registration" as an air freight forwarder. Upon an appropriate showing of certain minimum qualifications, a Letter of Registration may be issued without hearing or other formal proceedings. Persons obtaining such Letters of Registration are required to carry liability insurance for the protection of their customers. They also are subject to various regulatory provisions of the Act, including the requirement that they file and observe tariffs (Section 403, 49 U. S. C. 483).

Petitioner conceded before the Board, and concedes here (Br. p. 1), that the services performed on behalf of its membership are not different from those which are provided by air freight forwarders.[3] Those services and petitioner's method of operation may be described as follows:

An "Executive-Secretary" who also is a trucker is employed in the San Francisco area for the purpose of collecting individual boxes of flowers for shipment

[3] The Board's regulation provides exemption for a forwarder of property (14 C. F. R. 296.1)

"which, in the ordinary and usual course of his undertaking, (a) assembles and consolidates or provides for assembling and consolidating such property and performs or provides for the performance of break-bulk and distributing operations with respect to such consolidated shipments, (b) assumes responsibility for the transportation of such property from the point of receipt to point of destination, and (c) utilizes for the whole or any part of the transportation of such shipments, the services of a direct air carrier subject to the Act."

by air (R. 15, 323), and an office is maintained at the airport by the trucker-agent in the name of the petitioner (R. 15, 16, 33). The boxes of the individual members are picked up and brought to the airport by the trucker-agent, where boxes destined for the same or adjacent localities are consolidated by him for shipment (R. 18, 205, 206). The flowers are then consigned in petitioner's name to another agent at the distribution point, with the freight charges to be collected from the agent consignee by the air carrier (R. 104, 105, 318, 319). There is also collected from the agent consignee an "advance charge", presently sixty cents for each box of flowers in the consolidated shipment (R. 18, 19, 273, 317). This sum is remitted by the air carrier to petitioner's trucker-agent in San Francisco. Fifty-five cents of the advance charge on each box is retained by him as payment for his services and office expenses (R. 19, 273) and five cents is turned over to petitioner for use in defraying certain association expenses, including a part of the office expenses (R. 273).

The agent at the distribution point "breaks" the bulk shipment for distribution to the ultimate individual consignees, sometimes performing beyond-routing (280, 319, 320). He prorates the shipping charges between the individual consignees, and collects from them the prorated cost of transportation, plus the sixty cents advance charge for each box and whatever delivery fee is due him (Tr. 602, 629–633, R. 566).

The flowers which are shipped in this manner are either direct sales to the ultimate consignee, or are

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shipped on "consignment." In the case of consignments, the florist accepting the shipment undertakes to sell the flowers on commission for the shipper. The florist deducts his commission and the freight and advance charges from the proceeds of the sales, and remits the balance to the shipper (R. 181–183, 349). Where the shipment is a direct sale, the purchaser or ultimate consignee bears the freight and advance charges (R. 476). Thus, the member of petitioner's association who shipped the flowers bears the expense of shipment in the case of consignments (R. 349), whereas the ultimate consignee bears the expense in the case of outright sales (R. 476).

These consolidation and forwarding services are available only with respect to flowers shipped by the members of Bay Area, and Bay Area disclaims any responsibility to its members for loss or damage in shipments. The Board found on the basis of evidence hereinafter set forth (*infra,* pp. 13 to 16) that membership in petitioner is for the purpose of obtaining these services, and that membership is held out and is available to all growers and shippers in the San Francisco area (Board Report E–7139, *infra,* pp. 42, 63).[4] The services performed were determined by ~~its~~ the Board to be for "compensation" within the meaning of the Act (Report E–7139, *infra,* p. 43). Holding that petitioner could not alter its status by entering into agreements disclaiming carrier responsibility, the Board concluded that the activities were those of a common carrier and hence those of an

[4] The Board's report was not included in the printed record, and is set forth in its entirety as Appendix B to this brief.

indirect air carrier (Report E–7139, *infra,* p. 43). The Board also found that the operations were those of an indirect air carrier upon the additional ground that petitioner's services were held out and were available to any consignee who purchased flowers from a shipper member (Report E–7639, *infra,* p. 43). Accordingly, the Board ordered petitioner to cease and desist from engaging in its unauthorized activities.

During the course of the Board's proceeding, petitioner had sought a special exemption from the Act for its operations, and action on this application had been deferred pending a determination of petitioner's status (see R. 392). Concurrently with the issuance of the cease and desist order, the Board denied the exemption application (R. 390). Since the freight forwarder regulation was soon due to expire, the Board also instituted on the same day a general investigation into the problem of whether the regulation should be renewed and whether additional classifications of indirect property carriers should be established and additional exemption authority should be granted (*Air Freight Forwarder Investigation* case, C. A. B. Docket 5947, R. 406).

In denying petitioner's exemption application, the Board found that the application raised complex and controversial questions best determined only after full public hearing (R. 392), that the granting of exemptions such as requested by petitioner "might well lead to the demoralization and consequent destruction of the registered air freight forward industry" (R. 393), and that the Board consistently had refused to sanction unauthorized forwarding activities by shippers'

associations (R. 393). It pointed out that the *Air Freight Forwarder Investigation* afforded an appropriate forum for a determination of whether a special exemption should be granted to petitioner (R. 393), that petitioner was at liberty to file an application therein (R. 394), and that it was not in the public interest to grant an exemption at this time (R. 393).

Petitioner then sought reconsideration of the Board's actions, requesting, *inter alia,* that the Board stay the effective date of the cease and desist order until after completion of the proceedings in the *Air Freight Forwarder Investigation.* By supplemental opinion (R. 396), the Board declined to stay its order. It pointed out that petitioner could obtain a Letter of Registration and operate as an air freight forwarder without any undue burden and without making any substantial changes in its method of operations (R. 400–402). The Board again found that to permit petitioner to operate outside the regulatory framework of the Act would be contrary to the public interest in that similar treatment would be required for other such organizations, with possible disastrous consequences to the existing regulated industry and a resulting loss to the public and the direct air carriers of the services performed and traffic generated by authorized forwarders (R. 404–405).

STATUTES AND REGULATIONS INVOLVED

The principal provisions of the Civil Aeronautics Act here involved are set forth in Appendix A hereto (*infra,* p. 37). The Board's regulations governing

air freight forwarders appear in 14 Code Fed. Reg. 296.

QUESTIONS PRESENTED

In our view, the questions which are dispositive of this case are:

1. Whether the Board's findings that petitioner is an indirect air carrier are supported by substantial evidence.

2. Whether the cease and desist order entered by the Board is sufficiently definite in its terms.

3. Whether the Board's alleged abuse of discretion in refusing to suspend the effectiveness of the cease and desist order presents an issue appropriate for judicial determination, and, if so, whether any abuse of discretion has been shown.

SUMMARY OF ARGUMENT

Petitioner exists for the purpose of providing air forwarding services. Its services are available to any grower or shipper of flowers in the San Francisco area willing to become a member of petitioner, and the only purpose of membership is to obtain the transportation services. Membership is actively solicited, and no person has ever been refused admittance.

These findings by the Board, supported by substantial evidence, plainly establish petitioner's activities to be those of a common carrier in relation to its membership. Petitioner holds out its services to the entire public which ships flowers from the San Francisco area. The law is clear that neither common carrier status nor regulatory statutes may be avoided through the device of interposing a member-

ship requirement as a condition precedent to obtaining transportation services. Equally clear is the fact that petitioner's claim of private carriage by analogy to "contract" operations is groundless. A "contract carrier" willing to contract, within the limits of its facilities, with all who meet its terms is a common carrier.

The Board's alternate finding of common carriage through petitioner's holding out and providing forwarding services for consignees also is supported by the facts and the law. The consignee who pays the charges is the purchaser of the transportation services, and petitioner's services are held out and available to all persons electing to do business with petitioner's membership.

Petitioner is unaided by the case of *United States* v. *Pacific Coast Wholesalers Association,* 338 U. S. 689 (1950). That case dealt only with the question of whether the operations there involved fell within the specific exemption contained in Part IV of the Interstate Commerce Act for "nonprofit" shippers organizations. There is no such exemption in the Civil Aeronautics Act, and the *Pacific Wholesalers* case does not purport to alter the established rule that so-called "nonprofit" organizations do not differ from any other form of corporate entity insofar as the question of common carriage is concerned.

II

The Board carefully reviewed petitioner's activities in its report, fully disclosing both the factual and legal basis for its determination of common carriage.

That report is incorporated in the cease and desist order, and affords adequate guidance to petitioner. It is impossible to formulate a precise order delineating a hard and fast rule for determining common carriage, and no greater specificity in the Board's order was appropriate or required. *Brady Transfer & Storage Co.* v. *United States,* 80 F. Supp. 110 (S. D. Iowa, 1948), affirmed, *per curiam,* 335 U. S. 875 (1948).

III

This Court will have exhausted its function after reviewing the Board's order on the merits. The question of whether the Board should suspend a valid order for reasons of transportation policy is not appropriate for judicial determination; it involves a purely administrative matter committed to the exclusive discretion of the Board. In any event, however, the Board plainly did not abuse its discretion in refusing to suspend its order for the lengthy period of time necessary to finally determine the *Air Freight Forwarder Investigation* case. There is no reason to believe that petitioner, as a result of that proceeding, will be permitted to operate entirely outside the framework of the Act, and the Board pointed out that petitioner can operate as a licensed air freight forwarder with little burden. Operation within the regulatory framework by petitioner and other similar organizations is required for the protection of the public and the regulated industry.

ARGUMENT

I. The Board correctly determined petitioner's status to be that of an indirect air carrier

Whether petitioner is an indirect air carrier within the meaning of the Civil Aeronautics Act depends on whether petitioner's forwarding activities are those of a "common carrier" (see Section 1 (21), *infra,* p. 37). The Board determined petitioner to be a common carrier, primarily on the ground that petitioner's transportation services are held out and available through membership to all growers and shippers of flowers in the San Francisco area, and on the secondary ground that its services are held out and available to all persons who purchase flowers from petitioner's membership.

The determination of whether a person is a common carrier is primarily one of fact in the light of applicable case law. 13 CJS Carriers § 3 (a). The Court's inquiry at this stage of the case accordingly is whether the Board's factual findings are supported by "substantial evidence" (Section 1006 (e), *infra,* p. 39), and whether, in the light of the facts found, the Board properly concluded that petitioner was a common carrier.[5] We demonstrate hereinafter that the record supports the Board's factual findings, and that petitioner is a common carrier in the light of applicable case law.

[5] Indeed, it has been held that whether one is a common carrier is a question of ultimate fact. *Haynes* v. *MacFarlane*, 207 Calif. 529, 279 P. 436 (1929); cf. *Fleming* v. *Chicago Cartage Co.*, 160 F. 2d 992 (C. A. 7, 1947).

A. The Board's findings that petitioner's transportation services are held out and available through membership to all growers and shippers in the San Francisco area, and that its services are held out and available to all persons who purchase flowers from petitioner's membership, are supported by substantial evidence

Petitioner was organized and exists for the primary purpose of affording reduced-rate transportation to growers and shippers of flowers in the San Francisco area and to their customers in Eastern markets (R. 140, 209, 473, 563). It was organized largely by a motor trucker (R. 12, 67, 215), and has continued in business principally through the efforts of another trucker, who presently serves as "Executive-Secretary" of petitioner. As previously indicated (*supra,* p. 5), the record discloses that operating expenses are paid almost entirely from the flat fee assessed against each box of flowers handled, and the difference is retained by the trucker-agent as his compensation or profit.

Only those flowers which are tendered by persons holding membership in petitioner are consolidated and forwarded by petitioner. However, the members are in competition with each other (R. 217, 507, 508), are not obligated to use Bay Area's services (R. 219, 300), and in fact quite frequently use the services of other forwarders (R. 177, 196, 218, 469). As the Board found, the purpose of membership is to obtain the transportation services.[6]

[6] Petitioner attempted to establish before the Board that services other than transportation services were rendered to the membership. So far as the record reveals, the only other service is to call the Weather Bureau (which the members can do equally well) and to relay the weather report to the members (see R. 188, 437, 444, 456).

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It is obvious, of course, that the profits of the trucker-agent will increase with increased membership. Equally obvious is the fact that the transportation costs for the individual boxes of flowers will decrease as the volume of shipments increase since those costs are assessed on a *pro rata* basis in relation to the entire consolidated shipment (cf. R. 242, 433, 563). Under these circumstances, intensive efforts have been made by both the trucker-agent and individual members of petitioner to secure additional members and business.

The evidence shows that membership was, and so far as this record discloses still is, "open to anyone" in the San Francisco area qualifying as a grower or shipper (R. 214, see, also R. 143, 227).[7] Efforts (both by personal solicitation on the part of the trucker-agent and by word-of-mouth representations of the members) have been made to bring all growers and shippers in the area into the organization (R. 12, 13, 47, 120, 154, 267, 268, 495, 504). Indeed, Mr. Barulich, the present trucker-agent or "Executive Secretary" was first employed as a "sales and public relations man" (R. 267), whose duties, for almost a year, were the solicitation of membership in petitioner and the soliciting of persons to ship via petitioner (R. 267, 268, Appendix B, p. 52, *infra.*). While some members have been dropped for nonpayment of dues (R. 243, Appendix B, p. 58, *infra*), membership has

[7] The minutes of one of petitioner's meetings states: "The Board of Directors was instructed to accept anyone in the consolidation, as it would help in lower prices per box." Enforcement Attorney's Exhibit 329, Tr. 2053.

never been refused to any grower or shipper in the area (R. 214, 299).[8]

Additional attempts to obtain members and business is disclosed by the petitioner's efforts to have Eastern florists request their shippers to utilize Bay Area's services. Letters have been sent to Eastern dealers asking that they request the use of petitioner's services (R. 253), and personal contact has been made with such dealers for the same purpose (R. 290–297, 301–306). Numerous requests for Bay Area service have in fact been received by various shippers as a

[8] Annual dues were not assessed until after the institution of the Board's proceeding in 1951 (R. 3), and then in the nominal amount of $50 (R. 300, 244), primarily for the purpose of defraying the expenses incident to the Board's proceeding (see Appendix B, p. 58, *infra*).

After institution of the Board's proceeding, other changes also followed. A "contract of employment" between petitioner and Mr. Barulich, the trucker-agent, was entered into whereby Barulich became the "Executive Secretary" of petitioner with a guaranteed minimum salary of $5,000 (Enforcement Attorney's Exhibit No. 389, Tr. 2130). However, the profit from the pickup and the consolidation charges has yielded Mr. Barulich more than this guaranteed amount, and no salary has in fact been paid to him (see R. 290). Various changes in accounting methods and the allocation of portions of the flat fee charged for each box between "pickup" and "consolidation" charges also have been made, including an allocation of 5 cents per box to petitioner to defray "consolidation expenses" (see R. 271–273, 277, 321).

These changes appear to have been made in an effort on the part of the trucker-agent to avoid carrier status. Interestingly enough, however, Mr. Barulich described himself, in October 1951, as self-employed and as engaging in the "air freight forwarding" business (R. 307). Although charged with unauthorized freight forwarding activities by the Board's Office of Enforcement, the Board made no determination of Barulich's status, holding that the cease and desist order entered would run against him as petitioner's agent (Appendix B, p. 44, *infra*).

result of these efforts (R. 46, 50, 118, 148, 149, 150, 177, 178, 197, 239, 243).

Another part of the publicity campaign has involved direct advertising. This was accomplished by the use of stickers "to be made up and bought by the members to be placed either on each box or bill, building up sales for the group air shipments" (Enforcement Attorney's Exhibit 315, Tr. 2043). Manifests to be used by the members were ordered by Bay Area and showed the Bay Area name (Enforcement Attorney's Exhibit 237, Tr. 1965). An affiliate membership was secured with the Society of American Florists (Enforcement Attorney's Exhibit 337, Tr. 2061), which is primarily a cooperative advertising organization. Advertising was also pursued in the San Francisco area by having the Bay Area name lettered on the trucks used for pickup and delivery (Enforcement Attorney's Exhibit 166–770, 330, 359, Tr. 1894–1898, 2054, 2083), by having a Bay Area telephone listing (Enforcement Attorney's Exhibit 180, Tr. 1909), and by using Bay Area letterheads and envelopes (Enforcement Attorney's Exhibit 175, 179, Tr. 1903, 1908).

In short, the record admits of no conclusions other than that petitioner's services are held out and are available through membership to all growers and shippers in the San Francisco area, and are directly held out and available to all persons who do business with the members. Petitioner's penetration of the San Francisco market has been substantial. While its membership has never exceeded twenty-six at any one time (out of a total number of potential flower

shippers in the area variously estimated as fifty (R. 144), one hundred or more (R. 467), and two hundred and twenty-nine (R. 519)), it claims to handle over 50% of the flowers shipped from the San Francisco area (Br. p. 31), and its services are available to some 750 individual consignees. Its failure to occupy the entire field is not due to lack of effort on its part, but simply to an inability to obtain all the business despite those efforts.

B. Petitioner's activities are those of a "common carrier"

Upon the basis of the foregoing findings, petitioner plainly is a common carrier. Petitioner erroneously supposes that, because it limits its activities to powers and its services to its members and their patrons, common carrier status is thereby avoided. Numerous common carriers, particularly in the motor carrier field, limit their services to particular commodities. See e. g., *Alton R. Co.* v. *United States,* 315 U. S. 15 (1942); *Bowles* v. *Wieter,* 65 F. Supp. 359 (E. D. Ill., 1946); *Affiliated Service Corp.* v. *P. U. C.,* 127 Ohio St. 47, 186 N. E. 703 (1933). Moreover, there is no requirement that one must hold himself out to serve each and every member of the public before he may be a common carrier. Admittedly, there must be a "holding out" to serve the "public," but "[t]he public does not mean everybody all of the time." *Terminal Taxicab Co.* v. *Kutz,* 241 U. S. 252, 255 (1916). It is enough if the service is held out to those members of the public who have need for it. E. g., *Terminal Taxicab Co.* v. *Kutz, supra; Producers Transportation Co.* v. *Railroad Commis-*

sion, 251 U. S. 228 (1920); *Fleming* v. *Chicago Cartage Co.,* 160 F. 2d 992 (C. A. 7, 1947); *Alaska Air Transport* v. *Alaska Airplane Charter Co.,* 72 F. Supp. 609 (D. C. Alaska, 1947); *State* v. *Witthaus,* 340 Mo. 1004, 102 S. W. 2d 99 (1937); *Affiliated Service Corp.* v. *Public Utilities Commission,* 127 Ohio St. 47, 186 N. E. 703 (1933); *In Re Pacific Motor Transport Company,* 38 Calif. R. C. R. 874 (1933).

An application of this settled principle to the facts of record establishes beyond doubt that petitioner's activities are those of a common carrier. Viewing only its activities in the San Francisco area, petitioner holds out its transportation service by offering membership, both expressly and by course of conduct, to all growers and shippers in the area, the entire "public" involved.[9] Although membership is a prerequisite, petitioner through this familiar device can avoid neither the status of a common carrier nor the regula-

[9] Assuming that petitioner's recent incorporation under the California Agricultural Code may have the effect of limiting its membership only to growers, as distinguished from wholesalers who do not themselves raise flowers, its services are still available through membership to all of that portion of the public which engages in flower production, and compels no result different from that reached by the Board.

Petitioner's various contentions with respect to its inability to serve "the public" because of limitations in its corporate charter are irrelevant. In the first place, petitioner's charter permits and contemplates that all growers are to be served. More importantly, "whether a transportation agency is a common carrier depends not upon its corporate charter or declared purposes, but upon what it does." *United States* v. *California,* 297 U. S. 175, 181 (1936). It is only reasonable to assume that petitioner would have requested the Board to reopen the record to receive evidence of changes in petitioner's activities resulting from its reincorporation if any changes have in fact occurred.

tory requirements of the Civil Aeronautics Act. E. g., *West* v. *Tidewater Express Lines,* 168 Md. 581, 179A. 176 (1935); *Davis* v. *People,* 79 Colo. 642, 247 P. 801 (1926); *Affiliated Service Corp.* v. *Public Utilities Commission, supra; North Shore F. & F. Co.* v. *North Shore B. Men's T. Assn.,* 195 Minn. 336, 263 N. W. 98 (1935); *Natural Gas Service Co.* v. *Serv-YU Cooperative,* 70 Ariz. 235, 219 P. 2d 324 (1950); *State* v. *Rosenstein,* 217 Iowa 985, 252 N. W. 251 (1934); *Motor Freight Terminal Co.* v. *Burke,* PUR 1932 C, 72 (Cal. R. R. C.).

In apparent recognition of this fact, petitioner seeks to analogize its activities to those of a "contract carrier." Assuming that limiting service to members is analogous to limiting service to signatories of contracts, petitioner is not benefited thereby. If a carrier is willing to contract within the limits of its facilities with all persons who meet its terms, it is a common carrier. *Producers Transportation Co.* v. *Railroad Commission,* 251 U. S. 228 (1920); *Cornell Steamboat Co.* v. *United States,* 53 F. Supp. 349 (S. D. N. Y., 1943), affd., 321 U. S. 634 (1944); *Alaska Air Transport* v. *Alaska Airplane Charter Co.,* 72 F. Supp. 609 (D. C. Alaska, 1947); *Fordham Bus Co.* v. *United States,* 41 F. Supp. 712 (S. D. N. Y., 1941); *Bingaman* v. *Public Service Commission,* 161 A. 892 (Pa. Super., 1932); *Breuer* v. *Public Utilities Commission,* 118 Ohio St. 95, 160 N. E. 623 (1928); *Haynes* v. *MacFarlane,* 207 Calif. 529, 279 P. 436 (1929).

Petitioner's reliance upon Interstate Commerce decisions relating to "contract carriers" and the various tests devised by that agency for differentiating be-

tween "common" and "contract" carriers in doubtful cases is wholly misplaced. A reading of the various Commission cases relied upon by petitioner in its brief will readily disclose that the Commission, in common with the courts and other regulatory agencies, recognizes that the ultimate test of common carriage is whether there is a "holding out" or "offer" to serve the public generally as those terms are defined by applicable case law. See *Craig Contract Carrier Application,* 31 M. C. C. 705, 708–710 (1941). Where there is no direct holding out or stated willingness to serve the public, the Commission necessarily must resort to what it terms "subordinate or secondary tests" to determine whether there is in fact an offer of public service. These secondary tests include the so-called "specialization test," whereby the using of highly specialized equipment and the serving of only a few customers under long-term stable arrangements may serve to negative a public offering of service through course of conduct. A closely related secondary test is the form of contracts employed, and the Commission generally regards as "contract" or noncommon carriers only those persons who perform services under a few stable long-term written contracts which bind the shipper to tender and the carrier to transport the commodity involved. *Contracts of Contract Carriers,* 1 M. C. C. 628 (1937).[10]

As indicated, these secondary tests are applied only where the carrier's status is not otherwise clear.

[10] This view on the part of the Commission has received specific judicial approval. *Fordham Bus Corp.* v. *United States*, 41 F. Supp. 712, 718 (S. D. N. Y. (1941)).

Here there is no need for resort to any secondary test; petitioner's offer to serve the public is express. Nonetheless, if petitioner's solicitation of membership and business is disregarded, its activities plainly are still those of a common carrier under an application of the secondary tests upon which it relies.

With respect to the "specialization" test, it is obvious that petitioner's equipment is not highly specialized. And if it were, that fact still would not preclude common carrier status. It is common knowledge that a substantial part of the common carrier industry is devoted to providing services in special equipment such as refrigerator cars and trucks, tank cars, pipelines, special vehicles for the transportation of livestock, explosives, and the like. Nor is there any basis for petitioner's claim that it performs a highly specialized service which is in reality a part of the organization of each individual shipper. Indeed, petitioner concedes that its services are similar to those afforded by any other freight forwarder (Br. p. 1). The transportation of flowers obviously requires no greater skill and knowledge than does the transportation of any other perishable commodity. True, petitioner may observe the shippers' hours of loading and unloading (Br. p. 15). But as the Interstate Commerce Commission has held, even unusual catering to "the desires of * * * shippers as to the loading and unloading hours is no more than good business and efficient management. It is not alone enough to establish any bona fide specialization * * *." *Transportation Activities of Midwest Transfer Co.,* 49

M. C. C. 383, 398 (1949). See, also, *Fleming* v. *Chicago Cartage Co.,* 160 F. 2d 992, 996, 997 (C. A. 7, 1947); *Pregler Extension of Operation,* 23 M. C. C. 691, 695 (1940); *Bush Construction Co.* v. *Platten,* 48 M. C. C. 155, 162 (1948).

Further, even assuming that petitioner's activities are highly specialized in terms of equipment and services, there is plainly no specialization in the sense of a devotion of its efforts to a very limited number of shippers. Petitioner's shippers are restricted only by the number of persons having need for its services and its own inability to obtain more members despite its best efforts. The secondary tests of mutually binding long-term contracts, or of a stable number of shippers, plainly are not met. See *Contracts of Contract Carriers,* 1 M. C. C. 628 (1937). As the Commission has pointed out (*Transportation Activities of Midwest Transfer Co.,* 49 M. C. C. 383, 397 (1949)):

> * * * specialization in respect of shippers served is evidenced or negatived by the number served, by the apparent ease or reluctance with which new contracts (shippers) are added either in replacement of lost accounts or in addition to accounts already served.[11]

Here, there are no mutually binding arrangements between petitioner and its membership. There is no obligation to tender traffic, and the members in fact use the services of other forwarders (see *supra,* p. 13). Membership is shifting, with new members being

[11] Petitioner erroneously imputes this quotation (Br. p. 14) to the subsequent *Midwest* Case reported at 52 M. C. C. 33.

added and old ones dropping out.[12] Insofar as the secondary tests are concerned, petitioner's situation resembles that described in *Producers Transportation Co.* v. *Railroad Commission,* 251 U. S. 228, 232 (1920), as follows:

> Looking through the maze of contracts, agency agreements and the like, under which the transportation was effected, subordinating form to substance, and having due regard to the agency's ready admission of new members and its exclusion of none, it was apparent that the Company did in truth carry oil for all producers seeking its service, in other words, for the public.

We also note petitioner's apparent contention that common carrier status is avoided through its disclaimer of responsibility to its members for loss or damage to shipments (Br. pp. 21, 22). However, as the Board pointed out (Appendix B, *infra,* p. 43), a carrier cannot divest itself of carrier status through this expedient. *Bank of Kentucky* v. *Adams Ex. Co.,* 93 U. S. 174, 180–181 (1876); *Railroad Company* v. *Lockwood,* 17 Wall. (84 U. S.) 357, 376 (1873). As stated in *Liverpool Steam Co.* v. *Phenix Ins. Co.,* 129 U. S. 397, 440 (1889):

> A common carrier is such by virtue of his occupation, not by virtue of the responsibilities

[12] The fluctuating membership of petitioner (R. 219, 220, Enforcement Attorney's Exhibit 391, Tr. 2136) is in sharp contrast to cases involving stable relationships such as *Ace High Dresses* v. *L. C. Trucking Co.*, 122 Conn. 578, 191A. 536 (1937), also relied upon by petitioner. There the number of long-term contracts had dwindled from eight to five, and there was no holding out of contractual services to the public.

> under which he rests. * * * A carrier who stipulates not to be bound to the exercise of care and diligence seeks to put off the essential duties of his employment.[13]

Turning now to the alternate finding by the Board of common carrier status because of the services held out and afforded to the customers of petitioner's membership, we think petitioner's status to be equally clear. There is no question here involved of *bona fide* shipment by petitioner of its own goods. Petitioner is engaged solely in the transportation business, and employs the familiar freight forwarder technique of advertising its services to consignees. The services are held out and are available to all that public which purchases flowers from the members. True, the

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[13] Petitioner's specific contention appears to be that an "air freight forwarder" under the Board's regulation is restricted to a person who *voluntarily* assumes responsibility for shipments. Actually the Board did not find petitioner to be an "air freight forwarder," but rather an "indirect air carrier." However, a person who actually forwards for the public, as does petitioner, assumes responsibility for its shipments as a matter of law. *Republic Carloading & Distributing Co., Inc. Freight Forwarder Application*, 250 I. C. C. 670 (1943). See also, *W. J. Byrnes & Co., Freight Forwarder Application*, 260 I. C. C. 55 (1943). *Vendors Consolidating Co., Freight Forwarder Application*, 265 I. C. C. 719, 724 (1950).

Moreover, petitioner recognizes its responsibility to its patrons. Prior to the enforcement proceeding it carried a policy of insurance against all risks of loss or damage to cargo carried by it (R. 402, Enforcement Attorney's Exhibits 352, 353, Tr. 2076, 2077). It currently carries motor carrier cargo liability insurance, purchases excess valuation for consolidated shipments from the direct air carrier, processes claims for loss and damage, and settles such claims on Bay Area's checks (R. 307, 315, 326, 327, 401, 402, 443).

source of supply is limited to the flowers of the membership. But the case in this respect is no different from that in which the source of patronage is restricted to the guests of a hotel (*Terminal Taxicab Co.* v. *Kutz,* 241 U. S. 252 (1916)), or from the familiar cases in which persons attempt to avoid the impact of regulatory statutes by buying goods and then selling them substantially at cost, plus transportation charges, to any person willing to buy. See e. g., *A. W. Stickle Co.* v. *Interstate Commerce Commission,* 128 F. 2d 155 (C. A. 10, 1942), cert. den., 317 U. S. 650 (1942). The Interstate Commerce Commission holds that freight forwarders whose business is derived substantially or in part from solicitation of consignees fall within the regulatory provisions of the Interstate Commerce Act. *Kelly Freight Forwarder Application,* 260 I. C. C. 315, 317–319 (1944); *Twin Cities Shippers Assn. Freight Forwarder Application,* 260 I. C. C. 307, 308 (1944); cf. *W. J. Byrnes & Co. of New York, Inc., F. F. Application,* 260 I. C. C. 55 (1943).[14] Petitioner claims that a different rule should apply here because the shipper often utilmately bears the transportation cost. However, petitioner is a stranger to that aspect of the arrangement between the shipper and the consignee. The consignee always pays the charges in the first instance, and accordingly

[14] For other situations in which persons have been held to be common carriers because of their relationships to consignees, see *Interstate Commerce Commission* v. *Pickard,* 42 F. Supp. 351 (W. D. N. Y., 1941); *Toussaint Contract Carrier Application,* 41 M. C. C. 459 (1942); *Phillips Packing Co., Common Carrier Application,* 260 I. C. C. 297 (1944).

is the purchaser for transportation purposes. *Adams* v. *Mills,* 286 U. S. 397 (1932).[15]

In this aspect of the case, petitioner places primary reliance upon the decision in *United States* v. *Pacific Coast Wholesalers,* 338 U. S. 689 (1950). Indeed, petitioner contended in effect before the Board, and suggests here, that this decision is wholly controlling and establishes that an organization such as petitioner cannot be regarded as a common carrier. But the *Pacific Coast Wholesalers* case dealt with the single question of whether the nonprofit organization there involved was entitled to the benefit of the specific statutory exemption in the Freight Forwarder Act for "the operation of a shipper, or a group or association of shippers, in consolidating or distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of receiving the benefits of carload, truckload, or other volume rates" (Part IV, Interstate Commerce Act, Sec. 402 (c), 49 U. S. C. 1002 (c)). In determining that the organization was entitled to the exemption, the Court held its "nonprofit" status to be unaltered by reason of the handling of shipments consigned to members

[15] Even if it be thought that a different rule should prevail in cases in which the member shipper ultimately bears the cost, petitioner still affords a substantial amount of service to consignees alone. According to petitioner's own estimate, 32% of the shipments represent direct sales to consignees where the shipping charges and consolidation fees are not charged back to the shipper. If petitioner does handle over 50% of the flowers moving from the area, as it asserts, then 16% of all area flower shipments are at the direct expense of the consignees, an amount plainly not *de minimis.*

in cases where the seller paid the transportation charges.

There is no problem presented in this case of whether petitioner would be entitled to the benefit of an exemption for "nonprofit" operations. No such exemption is contained in the Civil Aeronautics Act, and none was intended by the Congress.[16] This, standing alone, affords a complete answer to petitioner.

Moreover, we note that the language of the *Pacific Wholesalers* case relating to the agency between that association and its members is inapposite here. In *Pacific Wholesalers* there was no solicitation of sellers to use the services of the shippers association or any holding out to them of a public transportation service. Rather, when purchases were made, the seller was directed to deliver the goods to the association as the

[16] Part IV of the Interstate Commerce Act, the Freight Forwarder Act, was adopted in 1942, four years after the passage of the Civil Aeronautics Act. The House Report (Report No. 1172, 77th Cong., 1st Sess.) discloses that the Congress carefully drafted the Freight Forwarder Act in such fashion as to avoid any application to indirect air carriers of property. Moreover, Sections 1003 (b) and 412 (b) of the Civil Aeronautics Act were amended by the Freight Forwarder Act (see Section 4 of the Act of May 16, 1942, 56 Stat. 300, 301). Had Congress intended an exemption for "nonprofit" cooperative associations engaged in forwarding activities as in the case of similar surface forwarders, it would have provided the exemption in the course of its amendments to the Civil Aeronautics Act. Moreover, it may be noted that only those persons who perform the services defined as freight forwarding are included within the coverage of Part IV of the Interstate Commerce Act. The scope of the Civil Aeronautics Act is not so limited, but covers all those persons who perform what are essentially common carrier services in air transportation.

agent of the purchasing member, and the goods were forwarded by the association as the agent of the member. The Court held only that the arrangements between the association and its members which made it possible for the association to pass on savings to such members did not constitute a holding out to nonmembers (i. e., the consignor-sellers). The Court did not have before it and therefore did not pass upon a situation in which the association solicited business from all those persons dealing with the membership.

Here, petitioner actively solicits consignees, and the record shows that on numerous occasions (see *supra,* p. 15) consignees have requested the use of Bay Area. Moreover, as further distinguished from the *Pacific Wholesalers* case, petitioner's purpose is not restricted to the reduction of transportation costs to its members, but includes "saving the consignees their charges on air freight" (R. 140, see, also, R. 209). Accordingly, there is no warrant for petitioner's claim that it acts only as agent for its members in relation to the services on behalf of consignees. Petitioner is in the transportation business, and it is no more the agent of its members in this respect than any other carrier may be said to be the agent of those from whom shipments are received.[17]

There is nothing peculiar to cooperative organizations, including "nonprofit" organizations, which pre-

[17] Petitioner appears to suggest that its separate corporate entity should be disregarded both as to its services to members and consignees, and that the Court should view all of its activities as in reality between the individual members and the persons with whom they do business. But corporate entities are not to be disregarded in transportation matters unless some pub-

vents their being common carriers or public utilities, and the *Pacific Wholesalers* case certainly does not purport to alter existing law in this respect.[18] Petitioner argued before the Board, and suggests here, that, since it is not organized for "profit" and prorates the costs of its services, its operations are not "for compensation" within the meaning of Section 1 (21) of the Civil Aeronautics Act. But mere reimbursement for operating costs satisfies the "compensation" test, even where that reimbursement is alleged to be merely an "internal accounting arrangement." *Schenley Distillers Corp.* v. *United States,* 61 F. Supp. 981, 985, 987, 988 (Del., 1945), affd., 326 U. S. 432 (1946). See, also, *Citizens Bank* v. *Nantucket Steamboat Co.,* 5 Fed. Case No. 2730 (C. C., Mass., 1811); *Enterprise Trucking Corp., Contract Carrier Application,* 27 M. C. C. 264 (1941); *Re Merchants Truck Line of Pierpoint,* P. U. R. 1940 D.,

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lic purpose is to be served, and there is no warrant for disregarding petitioner's separate organization and activities here. See e. g., *Schenley Distillers Corp.* v. *United States*, 326 U. S. 32, 437 (1946); *cf. North Whittier Heights Citrus Association* v. *National Labor Relations Board*, 109 F. 2d 76 (C. A. 9, 1940).

[18] See e. g., *West* v. *Tidewater Express Lines, Inc.*, 168 Md. 581, 179 A. 176 (1935); *State* v. *Rosenstein*, 217 Iowa 985, 252 N. W. 251 (1934); *North Shore Fish & Freight Co.* v. *North Shore B. Men's Assn.*, 195 Minn. 336, 263 N. W. 98 (1935); *Natural Gas Service Co.* v. *Serv-YU Cooperative*, 70 Ariz. 235, 219 P. 2d 324 (1950); *Affiliated Service Corp.* v. *Public Utilities Comm.*, 127 Ohio St. 47, 186 N. E. 703 (1933); *Nightingale* v. *San Miguel Power Assn.*, 50 P. U. R. (N. S) 318 (Colo. P. U. C., 1943); *Gilman* v. *Somerset Farmers Cooperative et al. Co.*, P. U. R. 1930 C. 98 (Me. P. U. C.), rev. on other grounds, 129 Me. 243, 151 A. 440 (1930); *Motor Freight Terminal Co.* v. *Burke*, P. U. R. 1932 C., 72 (Cal. R. R. C.); *Re Merchants Truck Line of Pierpoint*, P. U. R. 1930 D., 413 (S. D. B. of R. C.).

413 (S. D. B. of R. C.). Moreover, petitioner conveniently overlooks the sixty cents charged for each box of flowers handled. This certainly constitutes "carriage—for compensation" under any definition of the term. Cf., e. g., *Collins-Dietz-Morris Co.* v. *State Corporation Commission,* 154 Okl. 121, 7 P. 2d 123 (1932); *Smith* v. *New Way Lumber Co.,* 84 S. W. 2d 1104 (Tex. Civil App. 1935). Petitioner is more than reimbursed for its services here. In fact, it would show a definite profit if its income were not siphoned off by the trucker-agent. Under any view of the case, petitioner's services plainly are those of a common carrier.

II. The Board's cease and desist order is sufficiently definite in its terms

The Board in its report (Appendix B) carefully reviewed petitioner's activities, and concluded that it was a common carrier, and hence an indirect air carrier. In an order which specifically incorporated this report, the Board directed petitioner to cease and desist from engaging "indirectly in air transportation," i. e., engaging in common carriage (R. 389).

In complaining that the order is void for indefiniteness, petitioner's primary grievance appears to be that the Board did not spell out a precise and exact method by which petitioner could continue its activities and at the same time avoid the requirements of the Civil Aeronautics Act. We do not think any agency to be under such a duty, or that it must indicate what its views might be with respect to facts and circumstances different from those presented.

Further, it is legally impossible to draft an order which contains any hard and fast rule for determining common carriage, a determination which can be made only in the light of any given set of facts. The very respects in which petitioner alleges the Board's order to be deficient abundantly illustrate this point.

The manner of assessing and collecting advance and other charges or of contracting for drayage services (Br. pp. 27 and 28) are not determinative of common carrier status. See e. g., *Bowles* v. *Wieter,* 65 F. Supp. 359 (E. D. Ill., 1946). Nor is common carrier status controlled by an enterprise's corporate structure, its bylaws, or its classifications of membership (Br. p. 28), as illustrated by the various decisions cited in notes 9 and 18, *supra,* pp. 18 and 29. Certainly there exists no method by which an agency or a Court can determine the precise number of contracts which represents the dividing line between private and common carriage (Br. p. 27). And it is apparent that a person may be a common carrier both as to "straight" and "consolidated shipments" (Br. p. 27).[19] In fact, despite unceasing litigation, no Court to our knowledge has ever been able to define a common carrier other than in general terms such as a person in the transportation business who holds out

[19] The Railway Express Agency, which does not consolidate shipments, is an "indirect air carrier" under the Civil Aeronautics Act. *Railway Express Agency, Grandfather Certificate,* 2 C. A. B. 531 (1941); See *National Air Freight Forwarding Corp.* v. *Civil Aeronautics Board,* 197 F. 2d 384, 388, 389 (C. A. D. C., 1952). Moreover, it is common practice for forwarders to make "straight" shipments either as a special accommodation or because other shipments destined for the same or adjacent localities are not received so that consolidation is impossible.

his services to the public or who invites the patronage of the public. In this connection it is not amiss to point out that injunctions issued by the Courts against unlawful common carrier activities are seldom more specific than the Board's order, nor can they be.[20]

Petitioner's contentions regarding the indefiniteness of the Board's order are, we believe, wholly governed by the decision in *Brady Transfer & Storage Co.* v. *United States,* 80 F. Supp. 110 (S. D. Iowa, 1948), affd., *per curiam,* 335 U. S. 875 (1948). There the order also incorporated the Commission's report, and required the respondent to cease and desist from "the motor carrier operations which it is found in said report now to be conducting * * *." In response to a contention that the order was indefinite, the Court held (80 F. Supp. at p. 118)—

> * * * the Commission has gone to considerable lengths in advising Brady and other carriers of what factors may be relevant to a determination by the carrier of its rights under an irregular route certificate. It cannot, as

[20] In *American Shippers and Civil Aeronautics Board* v. *Twentieth Century Delivery Service*, S. D. Calif., Case No. 13217–BH, Judge Harrison recently issued an injunction against operations very similar to petitioner's which prohibited the defendant there involved from "holding out" to the public, or "undertaking" to provide for the public, assembly, consolidation, and break-bulk services in "interstate air commerce." Similarly, in *Alaska Air Transport* v. *Alaska Airplane Charter Co.*, 72 F. Supp. 609 (D. C. Alaska, 1947), the Court in effect enjoined the air carrier from operating as a common carrier, employing the familiar prohibition in its injunction against "holding out to the public" and "transporting" persons and property for compensation or reward. See, also, *Stickle Co.* v. *Interstate Commerce Commission*, 128 F. 2d 155, 156 (C. A. 10, 1942).

heretofore observed, lay down any hard and fast inelastic rule by which every case can be automatically determined. The order is sufficiently definite and certain that it is not invalid for want thereof.

The Board's report in this case fully discloses both the factual and legal basis for its determination, and affords adequate guidance to petitioner as to the elements of common carriage. Here, as in *Brady,* no greater specificity in the order was appropriate or required.

III. Even if reviewable, the Board's refusal to stay the effectiveness of the cease and desist order until completion of the *Air Freight Forwarder Investigation* case did not constitute an abuse of discretion

Petitioner requests, *inter alia,* that the Board's order be set aside on the ground that the Board should have permitted continuance of petitioner's operations pending completion of lengthy proceedings yet to be held in the *Air Freight Forwarder Investigation.* Although couching its argument in terms of an abuse of discretion on the part of the Board in refusing to suspend its order under the provisions of Section 1005 (d) (*infra,* p. 38), petitioner's plea in reality is that the Court act in a supervisory administrative capacity, and authorize or compel authorization or sanctioning of that which the Board has refused.

It is elementary, of course, that, in reviewing administrative orders, a "court of review exhausts its power when it lays bare a misconception of law and compels correction" *Scripps-Howard Radio* v. *Commission,* 316 U. S. 4, 10 (1942). If the Board's order

is valid on the merits, as we believe to be the case, a determination to this effect by the Court should end this review proceeding. Neither the issuance of operating authority nor the directing of such issuance is a judicial function. *Federal Radio Commission* v. *General Electric Co.,* 281 U. S. 464 (1930); *Federal Communications Commission* v. *Pottsville Broadcasting Co.,* 309 U. S. 134 (1940); *State Airlines* v. *Civil Aeronautics Board,* 174 F. 2d 510, 518 (C. A. D. C. 1949), reversed on other grounds, 338 U. S. 572 (1950); cf. *Scripps-Howard Radio* v. *Commission,* 316 U. S. at p. 14. Further, a sanctioning of unauthorized activities through the expedient of enjoining the enforcement of a valid administrative order is beyond the province of a Court. *Proctor & Gamble Co.* v. *Coe,* 96 F. 2d 518, 522 (C. A. D. C. 1938). Moreover, we note that Section 1005 (d) leaves to the Board, "as it shall deem proper," the question of whether it shall suspend its orders. We think the question of whether a valid Board order shall be suspended for reasons of regulatory policy to be one inappropriate for judicial determination, and committed to the exclusive discretion of the Board.

Nonetheless, if the question is open to review, it is plain that no abuse of discretion occurred. The Civil Aeronautics Act contemplates that authorization to engage in air transportation shall be obtained in advance of inaugurating operations, and not subsequent thereto. It is in the public interest that this principle be enforced; regulatory chaos otherwise would follow. As the Board found, if petitioner's unauthorized activities are to be sanctioned, then the same treatment would be required as to other persons.

The Board consistently has refused to sanction unauthorized forwarding activities (R. 393). This refusal is based not only on the general policy of law enforcement, but on practical reasons which are apparent from this record. Petitioner asserts that it handles over 50% of all the flowers moving from the San Francisco area. Without compliance with requirements reasonably designed to protect the public and the air transportation industry, petitioner has appropriated a substantial part of the air freight forwarding business. Organizations such as petitioner would multiply if not checked, with the results that the public would suffer from financially irresponsible organizations, effective regulation would be impossible, and the operations of these organizations would have a disastrous effect upon the regulated forwarders due to opportunities afforded for rate-cutting and the like (see R. 404, 405). Moreover, there is no reason now to believe that, at the conclusion of the *Air Freight Forwarder Investigation* case, persons such as petitioner will be permitted by exemption to operate free of regulatory control.

It is to be borne in mind that only a limited number of commodities move by air in substantial volume. The principal traffic (clothing, flowers, seafood, and other perishables and nonperishables having a relatively high value) is peculiarly susceptible to being handled by shippers' organizations. The effect upon the public and the air transportation industry of the operations of these organizations is important, whereas the burden of operating within the framework of the Act for those who can qualify is relatively slight. As the Board pointed out, petitioner can obtain au-

thorization and operate as a freight forwarder with little burden upon it, and at the same time provide the public with the protection to which it is entitled (R. 401, 402). Petitioner need not cease its activities unless it so elects. And if it does, there will be no dire consequences to the flower industry (see R. 402, 403). The fact that petitioner would prefer not to abide by the requirements of the Act during the period of time necessary for determination of the *Air Freight Forwarder Investigation* case, which we estimate to be at least a year, affords no basis for the claim of abuse of discretion advanced by petitioner.

CONCLUSION

The Board's order should be affirmed.

Respectfully submitted.

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APPENDIX A

The pertinent provisions of the Civil Aeronautics Act of 1938, as amended,[1] are as follows:

Definitions

SEC. 1. As used in this Act, unless the context otherwise requires—

* * * * *

(2) "Air carrier" means any citizen of the United States who undertakes, whether directly or indirectly or by a lease or any other arrangement, to engage in air transportation: *Provided,* That the [Board] may by order relieve air carriers who are not directly engaged in the operation of aircraft in air transportation from the provisions of this Act to the extent and for such periods as may be in the public interest.

* * * * *

(10) "Air transportation" means interstate, overseas, or foreign air transportation or the transportation of mail by aircraft.

* * * * *

(21) "Interstate air transportation," "overseas air transportation," and "foreign air transportation," respectively, mean the carriage by aircraft of persons or property as a common carrier for compensation or hire or the carriage of mail by aircraft, in commerce between, respectively—

(a) a place in any State of the United States, or the District of Columbia, and a place in any other State of the United States, or the District of Columbia; or between places in the

[1] Act of June 23, 1938, c. 601, 52 Stat. 973; Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 F. R. 2421, 54 Stat. 1235, 49 U. S. C. 401, et seq.

same State of the United States through the air space over any place outside thereof; or between places in the same Territory or possession of the United States, or the District of Columbia;

(b) a place in any State of the United States, or the District of Columbia, and any place in a Territory or possession of the United States; or between a place in a Territory or possession of the United States, and a place in any other Territory or possession of the United States; and

(c) a place in the United States and any place outside thereof, whether such commerce moves wholly by aircraft or partly by aircraft and partly by other forms of transportation.

CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

* * * * *

CERTIFICATE REQUIRED

SEC. 401 (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the [Board] authorizing such air carrier to engage in such transportation * * *

ORDERS, NOTICES, AND SERVICE

* * * * *

SUSPENSION OR MODIFICATION OF ORDER

SEC. 1005 (d) Except as otherwise provided in this Act, the [Board] is empowered to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

JUDICIAL REVIEW OF [BOARD'S] ORDERS

* * * * *

FINDINGS OF FACT BY [BOARD] CONCLUSIVE

SEC. 1006 (e) The findings of facts by the [Board], if supported by substantial evidence, shall be conclusive. No objection to an order of the [Board] shall be considered by the court unless such objection shall have been urged before the [Board] or, if it was not so urged, unless there were reasonable grounds for failure to do so.

APPENDIX B

UNITED STATES OF AMERCA

CIVIL AERONAUTICS BOARD

WASHINGTON, D. C.

E–7139

Docket No. 4902 et al.

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA ET AL.

Decided February 5, 1953

CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA HELD TO BE AN AIR CARRIER ENGAGED INDIRECTLY IN THE TRANSPORTATION OF PROPERTY BY AIR AND ORDERED TO CEASE AND DESIST FROM VIOLATING SECTION 401 (a) OF THE ACT

Appearances: Antonio J. Gaudio for Consolidated Flower Shipments, Inc.—Bay Area, John C. Barulich and William Zappettini. Paul T. Wolf for Airborne Flower & Freight Traffic, Inc. John J. Stowell and William P. Sullivan for the Office of Enforcement, Civil Aeronautics Board.

Opinion

BY THE BOARD:

This proceeding was instituted by an order of the Board, adopted April 9, 1951 (Serial No. E–5264), to determine whether respondents Consolidated Flower Shipments, Inc.—Bay Area (Bay Area), John C. Barulich, and William Zappettini have been

or are now engaged indirectly in air transportation in violation of section 401 (a) of the Civil Aeronautics Act of 1938, as amended, and Part 296 of the Board's Economic Regulations.[1] On November 7, 1951, a formal complaint was filed by Airborne Flower and Freight Traffic, Inc. (Airborne), alleging in substance that Bay Area is or has been engaged unlawfully in indirect air transportation. This complaint was assigned Docket No. 5187, and subsequently was consolidated for hearing and decision in this proceeding.[2]

After due notice, a public hearing was held before Examiner Richard A. Walsh, who issued an Initial Decision recommending that Bay Area and Barulich be ordered to cease and desist from further violations of section 401 (a) of the Act and Part 296 of the Economic Regulations, and that the proceeding, insofar as it relates to Zappettini, other than in his capacity as an officer and director of Bay Area, should be dismissed. Respondents filed exceptions to the Initial Decision, supported by a brief. The Board has heard oral argument, and the case now stands submitted for decision.

Attached hereto as an appendix are portions of the Initial Decision, describing in detail the operations of Bay Area and Barulich and containing the findings, conclusions and recommendations with which we agree and which we adopt as our own.

The primary issue presented by the exceptions is whether Bay Area is a common carrier for compensation or hire. Bay Area is a nonprofit, nonstock

[1] Although only Bay Area was named as respondent in the order, Barulich and Zappettini were added as corespondents by stipulation at the prehearing conference held June 12, 1951, and it was agreed that they would be bound by the Board's decision herein and any orders issued pursuant thereto.

[2] Order Serial No. E–5993, adopted December 29, 1951.

company incorporated under the laws of the State of California.[3] It has a membership of 26 flower growers and shippers in the San Francisco Bay area and was organized for the purpose of pooling small individual flower shipments of the various members into large single shipments for transportation by air at lower bulk rates.

Respondents concede that in their physical aspects, the operations and service performed by Bay Area in behalf of its members are not unlike those usually performed by common carrier freight forwarders. It contends, however, that it is not a common carrier, because (1) it is a nonprofit corporation whose services are available only to its members, (2) its services are provided on a prorated cost basis, and, therefore, are not performed for compensation or hire, (3) it does not assume responsibility to its members for loss of or damage to shipments.

Upon the basis of the Examiner's findings and conclusions, we are satisfied that Bay Area is a common carrier for compensation within the meaning of the Act. The fact that membership in Bay Area is a prerequisite to obtaining its services does not detract from this conclusion, since membership is readily attainable, involves no obligation other than the payment of nominal dues, and has as its sole purpose

[3] At the oral argument, counsel for respondents advised the Board that a few days before the oral argument, amendments of incorporation were filed, bringing Bay Area under the Nonprofit Cooperative Association Act of the State of California. We are not required to determine the effect, if any, of such amendment upon Bay Area's status as a common carrier, because (1) the amendment referred to is not a matter of record in the proceeding, and (2) the determination whether a carrier is a common carrier depends not upon what its charter says, but upon the manner of its operations. *Terminal Taxi Co.* v. *Dist. of Columbia*, 241 U. S. 252, 254.

eligibility for Bay Area's services.[4] Nor does the fact that Bay Area's services are provided on a prorated cost basis mean that they are not performed for compensation, as the Examiner's discussion amply demonstrates.[5]

Respondent's contention that Bay Area is not a common carrier because, by agreement with its members, it does not assume responsibility for loss of or damage to shipments is fallacious. Liability for loss or damage is a consequence, rather than a test, of common carrier status. And a carrier cannot divest itself of its common carrier status by the simple expedient of entering into an agreement with its customers purporting to relieve itself of its normal liability. *Bank of Kentucky* v. *Adams Ex. Co.,* 93 U. S. 174, 180–181; *Railroad Company* v. *Lockwood,* 17 Wall. (84 U. S.) 357, 376.[6]

We conclude, therefore, that Bay Area is a common carrier for compensation and, as such subject to regulation under the Act. As to the other respondents, we agree with the Examiner that the proceeding

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[4] The holding out of its services to shippers constitutes sufficient grounds for the conclusion that Bay Area is a common carrier. In addition, however, upon the basis of the Examiner's findings of fact with respect to the manner and extent to which Bay Area held out its services to consignees, we conclude that Bay Area is a common carrier by reason of such activities. See page 11 of the appendix [*infra*, p. 64].

[5] See p. 12 of Appendix [*infra*, p. 68].

[6] It is not clear whether, by this contention, Bay Area seeks also to avoid being classified as an air freight forwarder, which the Board has defined as one who, among other things, "assumes responsibility for the transportation of such property from the point of receipt to point of destination" (Sec. 296.1, Economic Regulations). If this be the thrust of respondents' argument, it would work to Bay Area's disadvantage, rather than to its benefit. Under the Act, no air carrier may operate in interstate air transportation without a certificate of public convenience and

should be dismissed as to Zappettini, other than in his capacity as an officer and director of Bay Area. With regard to Barulich, we do not find it necessary to determine whether he is a joint adventurer with Bay Area in the operation of the latter's service, since any order against Bay Area would also run against Barulich as its executive secretary, as well as against its officers, directors, representatives, and agents generally. Having concluded that Bay Area is a common carrier for compensation under the Act, has operated as an indirect air carrier in violation of section 401 (a) of the Act, and that it should be ordered to cease and desist from so doing, it is unnecessary for us to determine whether Bay Area is a freight forwarder under Part 296 of the Economic Regulations.

We have carefully considered all of the exceptions to the Initial Decision and find, except to the extent indicated herein, the exceptions are without merit and should be overruled. In view of the foregoing and all the evidence of record, we find:

1. Bay Area, a corporation organized, existing and doing business under the laws of the State of California, has held itself out and continues to hold itself out to the public as a common carrier to provide transportation of property in interstate commerce for compensation and is an air carrier as defined in section 1 (2) of the Act engaged indirectly in the transportation of property by air within the meaning of the Act.

2. Bay Area has not held and does not now hold a certificate of public convenience and necessity, a letter of registration, or any other authority from the Board

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necessity, unless the Board exempts it from such requirement (Secs. 1 (2), 401 and 416). Air freight forwarders currently operate pursuant to a general exemption granted in Sec. 296.3 of the Economic Regulations. It would follow, therefore, that if Bay Area does not meet the definition of an air freight forwarder in Sec. 296.1, it cannot qualify for the exemption.

authorizing it to engage indirectly in air transportation of property as a common carrier for compensation.

3. Bay Area has been and continues to be in violation of section 401 (a) of the Act.

4. Bay Area and Barulich, its executive secretary, and its officers, directors, agents, and representatives should be ordered to cease and desist from engaging indirectly in air transportation in violation of section 401 (a) of the Act.

5. This proceeding, insofar as it relates to Zappettini, other than in his capacity as officer and director of Bay Area, should be dismissed.

An appropriate order will be entered.

Ryan, Chairman, Lee, Adams, and Gurney, Members of the Board, concurred in the above opinion.

APPENDIX

EXCERPTS FROM THE INITIAL DECISION OF EXAMINER RICHARD A. WALSH, IN THE CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA—DOCKET NO. 4902 ET AL.

Bay Area was originally organized in April 1949, as an unincorporated nonprofit association under the name of Bay Area Flower Shippers and Growers. The association was composed of a small number of flower growers and shippers in the San Francisco bay area, and was formed for the purpose of pooling small individual flower shipments of the various members into large single shipments for transportation by air to other competitive areas at lower bulk rates. On June 14, 1949, the association was incorporated under the name of Bay Area Flower Shippers and Growers, Inc., as a nonprofit nonstock company and by amendment of its articles of incorporation on January 25, 1950, it acquired its present name of Consolidated Flower Shipments, Inc.—Bay Area.

According to its articles of association Bay Area was incorporated for the purpose of considering and formulating plans for the most economical transportation of flowers to eastern markets. The articles provide that Bay Area may employ such agent or agents as are necessary in the furtherance of this objective and it is empowered to do any and all things necessary in promoting the interest of the corporation which, by virtue of an amendment of the articles of association, effective February 18, 1952, includes the right to purchase, lease, hold, sell, develop, mortgage, convey, or otherwise acquire or dispose of real or personal property.

The articles provide for the offices of President, Vice President, Secretary and Treasurer and a board of directors consisting of three members. Under the bylaws the corporate powers are vested in the directors who are elected annually by the members. The president and other officers of Bay Area are appointed by the directors, who are also empowered to conduct, manage, and control the affairs and business of Bay Area and to formulate rules for the guidance of the officers in the management of its affairs. Under the bylaws as originally constituted the principal duties of the president consisted of presiding over all meetings of the corporation, the signing of contracts and other instruments having the prior approval of the directors, and the disbursement of funds by drawing upon the corporation's account when authorized by the Board. Initially the treasurer was authorized to receive funds and to make deposits in banks designated by the directors, and to disburse funds only upon checks signed by him and the president.

However, the bylaws were amended February 9, 1951, authorizing the president and directors to delegate the authority to sign contracts and draw checks to

other officers of the corporation, and authorizing the treasurer to direct the executive secretary to handle the corporate funds and make disbursements on checks signed by the president or an appointed director and countersigned by the secretary or executive secretary.

John C. Barulich is the sole owner and operator of Airport Drayage Company which performs pickup trucking service for the Bay Area members in the San Francisco area. As executive secretary of Bay Area Barulich performs or supervises the performance of consolidation services for Bay Area the details of which will be discussed later herein.

Barulich has been employed in various phases of transportation for the past 18 years. His experience includes service in shipping departments and warehouses of several reputable department stores and mercantile establishments and in the rates and tariff department and traffic department of two western railroads. Prior to joining Bay Area as traffic manager in September 1949 he was general traffic manager and superintendent of warehouses for the City of Paris Department Store in San Francisco and was chairman of the Central Committee for Air Movement of the Western Traffic Conference of which the City of Paris was a member. During the several months following his resignation from the City of Paris, Barulich became northern California Manager for California Shippers Associates and at the same time represented the Los Angeles Wholesale Institute in joint loading ventures. In addition Barulich took several courses in Traffic Management at Golden Gate College and Stanford University.

William Zappettini, former president and now vice president and director of Bay Area, is one of the largest wholesale flower shippers and growers in the United States. He has been in the flower business

since 1921 and has establishments located in San Francisco and Los Angeles, California and in Dallas and Fort Worth, Texas. This Respondent first began shipping flowers to eastern cities in rail refrigeration cars in 1927 and was one of the first persons in the area to ship flowers by air; the first such shipment occurring in 1937 or 1938. Zappettini continued to ship by air until the beginning of World War II when he was forced to discontinue due to the exigencies of the defense effort. Zappettini resumed shipping by air after the war on a direct carriage basis which involved his turning the flowers over directly to the air carriers for transportation. After the economies of bulk shipping were pointed out to him by representatives of airlines Zappettini joined with others in organizing Bay Area and has been an officer and director of that organization from its inception.

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Prior to the organization of Bay Area the flower shippers in the San Francisco area had available for the transportation of their products the services of the direct air carriers who were operating under the so-called collect distribution system,[7] and the consolidation services of Airborne. Motivated by a desire to obtain lower air freight rates to eastern points through bulk shipping Al Decia, owner of California Floral Company, and Clyde E. Reynolds, owner of Reynolds Brothers Transfer and Storage Company, canvassed a number of flower growers and shippers in the San Francisco area in early April 1949 and solicited their membership in the Bay Area associa-

[7] The collect distribution service involved an undertaking by the direct air carriers to transport the shipment of a single consignor to destination and there to break-bulk with respect to such shipment and to distribute the component shipments to the various consignees.

tion. After several meetings of the prospective members the association was incorporated on June 14, 1949, under the name of Bay Area Flower Shippers and Growers, Inc. Prior thereto, on June 7, 1949, Bay Area entered into an agreement with Clyde Reynolds to provide pickup, assembly and consolidation services for its members. Under this agreement, Reynolds received 50 cents for each box of flowers picked up at the shippers' places of business and delivered to his office at the airport and 25 cents for each box which the shippers delivered to the airport themselves.

By letter dated June 15, 1949, Zappettini appointed Reynolds agent for Bay Area for the purpose of issuing and countersigning Bay Area airbills. Under his agreement with Bay Area, Reynolds was not precluded from hauling shipments for nonmembers but although such shipments were transported to the airport in the same truck with those of the members none were consolidated with those of Bay Area or shipped on Bay Area manifests. The minimum pickup charge for nonmembers shipments was 75 cents per box. Reynolds selection of the underlying air carrier for movement of the flowers from origin to destination was subject to general routing instructions issued from time to time by Bay Area.

At the instance of the Bay Area officers and directors Reynolds leased office space at the San Francisco Airport where the assembly and consolidation services with respect to Bay Area shipments were performed. Reynolds executed the lease in his own name and it was he and not Bay Area who paid the office rent during his entire period of service with Respondent. Except for certain small articles of equipment owned by the Airport Authority Reynolds owned all of the office equipment at the airport office. Reynolds utilized

the services of from 1 to 4 drivers in his trucking service for Bay Area and of one employee at the airport for the performance of paper work incident to the assembly and consolidation of shipments.

Airbills for consolidated shipments were prepared by Reynolds or his employee at the airport office and the advance charges for his services were shown on the face thereof as being due and owing and payable to Reynolds Brothers. Upon delivery of the shipments at destination the advance charges were collected from the consignees by the direct air carriers and remitted to Reynolds who deposited them in his own account for his own use. Reynolds received no compensation from Bay Area for his services as agent but as indicated he did receive the whole of the advance charges assessed against each shipment for his trucking and consolidation services. The evidence shows that during the period July 27, 1949, to June 24, 1950, Reynolds paid all of the expenses of the Bay Area operation, including, the salary of his airport employee Talmadge Lloyd and rental for the airport office. The officers of Bay Area with the assistance of Reynolds arranged for the services of break-bulk agents for distribution of the smaller component shipments to the various consignees.

The first Bay Area shipments were made on or about June 24, 1949, and during the initial phase of the operation they moved on airbills of the direct air carriers which were prepared by Reynolds from the manifests prepared by the member shippers and received with the boxes at the airport. A separate airbill was prepared for each break-bulk point showing among other things the name Bay Area, Reynolds, agent, as consignor, the break-bulk agent as consignee, the number and total weight of the boxes being shipped, the description of the commodity, whether

cut flowers or decorative greens, and the total transportation charge, including the advance charges due Reynolds Brothers. Some of the boxes in the consolidation were transshipped to cities beyond the break-bulk points in which case a new airbill was prepared by the break-bulk agent naming himself as consignor and the purchaser of the flowers as consignee.

Although routing instructions were issued periodically by Bay Area indicating the airlines to be used in transporting flowers to certain cities, in practical effect Reynolds exercised a rather broad discretion in his choice of air carriers. For example, Bay Area issued instructions to Reynolds on July 12, 1949, to use American Airlines to Dallas, St. Louis, Memphis, Nashville, the District of Columbia, Philadelphia and New York, and Flying Tigers to Kansas City, Chicago, Detroit, Cleveland, and New York. However, on July 26, 1949, flowers were shipped via United Air Lines to Chicago, Cleveland, and the District of Columbia, and on August 3, 1949, in accordance with instructions on American's airbill, a shipment was dispatched beyond the District of Columbia, the break-bulk station, to Norfolk via Capital Airlines on the latter's airbill. Although all shipments now handled by Bay Area are transported without benefit of cargo insurance, a policy was issued in the name of Bay Area on August 25, 1949, insuring subscribing members against loss or damage to shipments until August 1, 1950. In each case the insurance charge was inscribed on the face of the airbill and collected along with the other charges from the consignee.

Pursuant to meetings of the board of directors held in August 1949, Bay Area began using its own manifests, it instructed Reynolds to give all airlines part of the consolidations, and it considered placing

stickers on boxes or airbills and changing Bay Area's name as a means of advertising its service. It also imposed an assessment of $25 on each member for the purpose of meeting operating expenses. At a meeting of the directors held September 23, 1949, Bay Area employed Barulich for a trial period of two weeks to handle consolidations and for the purpose of contacting disinterested members who were about to discontinue Bay Area's service and of soliciting new members in order to increase its volume of business and effect greater savings on shipments. As compensation for his services Barulich received a fee of 10 cents for each box of flowers transported by Reynolds to the airport and 5 cents per box for those delivered to the airport by the shipper. Barulich's compensation was paid by Reynolds out of the proceeds from advance charges, payments being made at regular intervals from October 7, 1949, until June 16, 1950.

Barulich was appointed agent for Bay Area by Zappettini on November 1, 1949, for purposes of issuing and countersigning airbills. On November 14, 1949, Barulich entered into an agreement with 8 Bay Area members for his services as traffic manager at the rates of compensation indicated above. His duties under this agreement were to have consisted of arranging for and supervising the pickup, assembly and consolidation services, and the handling of cargo insurance, claims and related matters. However, according to the testimony of Messrs. Reynolds and Lloyd, Barulich concerned himself for the most part with public relations work with member shippers and with soliciting new members at least until June 1950, and, notwithstanding his appointment as agent and traffic manager for the Bay Area members, the ad-

vance charges continued to be made in the name of Reynolds until June 10, 1950.

At a meeting of the directors held April 14, 1950, Barulich was appointed executive secretary of Bay Area and as such was authorized to sign contracts, and, in the absence of the president and vice president, to receive and deposit Bay Area funds in banks designated by the directors, and over his countersignature to disburse funds on checks signed by the President or an appointed director. The directors also approved the location of Bay Area's general office at Barulich's rail terminal office located at 815 Brannan Street in San Francisco and instructed Barulich to negotiate with Reynolds regarding the latter's proposed increase in hauling charges, and if unsuccessful to secure the services of another trucker at the then prevailing rate. In addition the directors passed a resolution prohibiting individual members from signing contracts and providing that, in the future, Bay Area alone should act and sign contracts in behalf of the members. At the same time the Board approved Barulich's association with the Flower Consolidations of Southern California and his assistance to that company in organizing a consolidation service in Los Angeles similar to that of Bay Area.

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Subsequent to the April 14, 1950, meeting of the Bay Area directors, Reynolds submitted a proposed optional service contract to Bay Area, one part of which proposed a trucking service only at a rate of 35 cents per box and the other a complete service including trucking, assembly and consolidation at the prevailing rates of 50 cents per box and 25 cents per box, respectively. Under the second alternative Barulich's services would not be required. When Bay Area

failed to accept his offer Reynolds terminated his service with Respondent on June 13, 1950, and during the next 10-day period Bay Area shipments were joint loaded with those of Airborne, and such shipments as Airborne obtained itself from Bay Area members were handled as Airborne shipments.

Pursuant to negotiations with Barulich, Reynolds operated a trucking service only for Bay Area during July and early August 1950 at a charge of 30 cents per box. Reynolds received payment for his service from Barulich who performed the consolidation service during that period. Barulich received for his service the difference of 20 cents per box between Reynolds charge and the advance charge of 50 per box. Reynolds discontinued his service completely for Bay Area when he sold his flower truck to Airborne on August 24, 1950. During the next few days the large shippers, including Messrs. Zappettini, Benaccorsi, Enoch and Nuckton, transported their own flowers to the airport. In response to the demands of and with the financial assistance of the latter individuals, Barulich purchased his own truck on or about August 26, 1950, and began operating a complete trucking, assembly and consolidation service. Trucking charges assessed against members who had hauled their own flowers to the consolidation point during the interim period were refunded by Barulich.

The procedure followed by Barulich in his performance of service for Bay Area is substantially similar to that employed by Reynolds. Each day Barulich calls the shippers to ascertain the number of boxes being shipped to each destination and after computing the totals of such shipments he calls the airlines for space reservations on their late afternoon or evening flights. Beginning at 1 p. m. and continuing until about 6 p. m. each day trucks are dispatched to the

shippers' places of business in the San Francisco area where the flowers are picked up and transported to Bay Area's airport office. Each shipment when received is accompanied by a flower manifest prepared in advance by the shipper on the face of which there appears his name as consignor, the name and address of the consignee, the number of boxes, the actual and dimensional weight of the boxes, whether it is being shipped collect or prepaid and whether it is to be shipped direct or as part of a consolidated shipment. In some cases the shippers prepare the airbills for direct shipments.

Upon receipt of the boxes at the Bay Area office the airbills and manifests are segregated according to whether they are direct or consolidated shipments, and further according to destination. Separate airbills are then prepared for the consolidated shipments for each break-bulk station. These airbills are prepared from the information appearing on the manifests and on the face thereof show Bay Area, Barulich agent, as consignor, the name of the individual or break-bulk agent, the number of boxes, description of the commodity, the weight of the shipment and charges therefor, whether it is a direct or consolidated shipment, whether it is prepaid or collect, and the beyond routing if any. The Bay Area advance charges are then inscribed on the airbills and manifests after which they are delivered with the boxes to the direct air carriers.

The air carrier enters the shipping charges on the airbill, retains one copy of the airbill, sends one copy with the manifests attached along with the shipment to the break-bulk agent for distribution purposes and returns one copy of the airbill and two copies of the manifests to Bay Area. The latter prorates the shipping charges on the manifest and retains the copy of

the airbill and one copy of the manifest and sends the other copy of the manifest to the shipper. Airbills are picked up by Bay Area daily from the direct air carriers and taken to its office where daily summaries are made of the advance charges. The air carriers are billed periodically for these charges which they pay directly to Barulich who deposits the proceeds thereof in his personal account.

Upon delivery of the shipment at destination the air carrier hands the airbill and manifest to the break-bulk agent who prepares therefrom a delivery statement setting forth the names, addresses and charges with respect to each consignee. The agent then breaks bulk and delivers the individual shipments to the various consignees and collects from them the total charges including his delivery charge. The break-bulk agent prepares new airbills for shipments moving to points beyond the break-bulk point, naming himself as the consignor and the purchaser as the consignee and the flowers are transshipped in accordance with the instructions on the manifests. The direct air carrier collects the shipping charges including Bay Area advance charges from the consignee and the advance charges are remitted to Barulich by the air carrier as indicated above.

Early in 1951 certain new services were made available to Bay Area members such as weather reporting, information relating to routings, general shipping and eastern market conditions, and procedures for the collection of c. o. d. deliveries and claims for lost or damaged shipments. C. o. d collections are remitted by the air carriers directly to the shippers but claims for lost or damaged shipments are filed by Bay Area with the direct air carriers and the proceeds thereof are remitted to Bay Area which in turn remits to the

shipper less a 10-percent commission paid to Barulich for his services in handling the claims.

The Chief of the Board's Office of Enforcement addressed a letter to President Zappettini on January 16, 1951, advising him of the possibility that Bay Area might be operating an air freight forwarder service and requesting him to submit a detailed statement describing the operation together with copies of the shipping documents used in the service. There was enclosed with his letter a copy of Part 296 of the Economic Regulations outlining the procedure to be followed by applicants in applying for Letters of Registration as air freight forwarders. Thereafter on February 9, 1951, Barulich negotiated a formal contract of employment with Bay Area pursuant to which he became executive secretary of Bay Area and was guaranteed a minimum annual compensation of $5,000 for his services. The record shows that the latter provision of the contract would become operative only in the event his annual income from advance charges fell below the $5,000 figure and even then he would receive only the difference between the amount actually earned and that guaranteed. The names of the 26 Bay Area members in good standing as of the same date appear in the footnote below.[8] On July 31, 1951, the Bay Area directors increased the advance

[8] Mountain View Greenhouses, Ozawa Bros. Nursery, T. & D. Wholesale Florist, F. H. Tsuneda, Tom Ozawa, Bear State Nursery, J. L. Mockkin, California Floral Company (Virginia Decia), Peninsula Wholesale Florist, S. F. Wholesale Cut Flowers, R. J. Adachi, Wong Wholesale Florist, John Nuckton Company, Bay Read Nursery, J. Oishi Nursery, A. G. Enoch Company, Boodell & Company, Western Wholesale Florist, Davidson & Matraia, William Zappettini Company, Golden Gate Wholesale Florist (James Bonaccorsi), Amling Floral Supply, Kearns Floral Supply, Stonehurst Nurseries, Shibuya Co., and Takamum Nursery.

charges by 10 cents per box of which 5 cents is retained by Barulich and 5 cents paid to the Bay Area operating fund. The purpose of the increase was to help Barulich meet the increase in operating expenses of his trucking service and to bolster Bay Area's cash resources so that it might contribute its pro rata share of the operating expenses of the Bay Area office. A part of the proceeds was also used to defray the expenses of Barulich's trip to Washington to attend the prehearing conference in this proceeding, and for legal fees.

The Bay Area members were notified by Barulich on July 16, 1951, of action taken at the second annual meeting of the membership levying an assessment of $50 for annual dues on each member payable on or before July 31, 1951. According to the testimony of Barulich this assessment was made necessary because of the tremendous increase in legal expense resulting from the instant proceeding.

At a meeting of the Bay Area members held in early August 1951 Messrs. Nuckton, Zappettini, Enoch, Bonaccorsi and Tsukagawa were elected directors and they in turn appointed Messrs. Nuckton, president, Zappettini, vice president and Tsukagawa, secretary-treasurer. During the period June 25, 1951, to October 13, 1951, six new firms were admitted to membership in Bay Area but on October 24, 1951, an equal number of members were dropped for nonpayment of annual dues.[9] This represents the first action ever taken by Bay Area to expel any shipper for any reason including nonpayment of dues * * *.

In this connection the record shows that a number of Bay Area members including Western Wholesale

[9] California Floral Co., Wong Wholesale Florist, J. Oishi Nursery, Davidson & Matraia, Stonehurst Nurseries, and Shibuya Company.

Florist, The Zappettini Company, Nuckton Company, Golden Gate Wholesale and the A. G. Enoch Company do not utilize Bay Area's service exclusively. Many of these members make frequent use of Airborne's service for both straight and consolidated shipments, and this is especially true where the consignees request excess valuation for their shipments and where shipments are destined to cities not served by Bay Area. Some members also ship via Airborne to cities served by Bay Area, and at least two shippers, Ambling Floral Supply and Boodell & Company, who ship regularly via Airborne are still members in good standing in Bay Area although they make only occasional or intermittent use of the latter's service.

As of October 24, 1951, Bay Area still had 26 members in good standing and it served 750 wholesale flower consignees scattered throughout the 48 states of the United States, the District of Columbia, and Canada. The record indicates that only 7 of the Bay Area members ship entirely on a consignment basis although approximately 68 percent of the 40,447 boxes handled by Bay Area in the last six months of 1951 involved consignment sales.

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While admitting that the physical aspects of its operation are similar to those of an air freight forwarder Bay Area takes the position that it is not a common carrier or an air freight forwarder and that, therefore, its operation is not subject to the jurisdiction of the Board under the Act. Specifically, it denies holding out to the public that it undertakes to transport property for compensation or hire, or that it provides transportation by air of articles for any person tendered in compliance with published tariffs.

Although the term common carrier is not defined in the Civil Aeronautics Act, it has a well established

meaning in law and has been defined variously in decisions of the Board and of the courts as one who holds himself out as ready and willing to undertake for hire the transportation of passengers or property from place to place and so invites the patronage of the public.[10] A private carrier, on the other hand, is generally defined by the courts as one who, without being engaged in such business as a public employment, undertakes for hire to deliver passengers or property in a particular case or under a special contract or special circumstances and does not hold itself out to the public as ready to act for all who may desire its services.[11]

The essential elements of common carriage are the holding out by the carrier of its service to the public and the undertaking to transport for hire passengers or property from origin to destination. The basic distinction therefore, between a common carrier and a private carrier for hire is that the common carrier holds itself out to all members of the public who might desire to use its service while the private carrier for hire agrees to carry such traffic only in special cases.

(a) Holding out of Service to Public

While there are many definitions of the term "holding out" the clearest and most understandable one is found in a decision of the Interstate Commerce Com-

[10] *Universal Air, Investigation Forwarding Activities*, 3 C. A. B. 698 (1942); *Page Airways, Inc., Investigation*, 6 C. A. B. 1061 (1946); *Transocean A. L., Enforcement Proceeding*, 11 C. A. B. 350 (1950); *Stimson Lumber Co.* v. *Kuykendall*, 275 U. S. 207 (1927); *Blumenthal* v. *United States*, 88 F. (2d) 522 (1937).

[11] *Smitherman and McDonald* v. *Mansfield Lumber Co.*, 6 F. (2d) 29; *Sanger* v. *Lukins*, 24 F. (2d) 226; *McKay* v. *Public Utilities Commission*, 104 Colo. 402, and cases cited in footnote 10.

mission rendered in 1939,[12] wherein the commission said:

> The question arises as to the meaning of "holds itself out" as applied to a common carrier. They clearly imply, we believe, that the carrier in some way makes known to its prospective patrons the fact that its services are available * * *. However the result may be accomplished, the essential thing is that there should be a public offering of the service, or in other words, a communication of the fact that the service is available to those who may wish to use it.

Accordingly, the real test for determining whether there has been a holding out to the public is whether a public offering of service has actually been made regardless of the time or the means employed by the carrier in bringing it to the attention of the public. It has long been recognized that a "holding out" may be accomplished in a great variety of ways. The most common method of course is by advertising the service in newspapers, magazines, brochures, etc. However, the mere absence of advertising raises no presumption that the carrier has not held its service out to the public if, in fact, the holding out had been accomplished by other means.

Reference to some of the leading court and administrative laws cases on the subject disclose many examples of what constitutes a holding out to the public. Thus, a holding out may be accomplished through solicitation by salesmen or agents, or it may be attained without the aid of solicitation or advertising if the evidence indicates that the carrier as a matter of policy generally serves all patrons, within the limits of its facilities, who may require its service, or that it maintains a known place of business where

[12] *Northeastern Lines, Inc.*, 11 M. C. C. 179 (1939).

members of the public may apply for its service.[13] It is clear also from these cases that a carrier need not serve all of the public in order to be classed as a common carrier, but may limit its service to a class or segment of the public provided it is willing to serve indiscriminately all members of the class.[14]

Moreover, the mere existence of written contracts governing the rendition of service irrespective of their legal sufficiency is not determinative of a carrier's status if in fact the service is available to the public. The important consideration in such cases is not the avowed purposes of the contract or the carrier's corporate charter but the manner in which the carrier actually provides the service. Thus, a carrier might perform services under contract with its patrons or even advertise itself as a contract carrier but such contracts and self-serving declarations would have no weight in determining the carrier's status where it appears from the manner in which the service is performed that it is available to the public generally. An occasional refusal by the carrier to provide service is likewise not sufficient to avoid the character of common carriage.[15] If on the other hand, the carrier

[13] *Grolbert* v. *Board of Railroad Comrs. of State of Iowa*, 60 F. (2d) 321; *Breuer* v. *Public Utilities Commission*, 118 Ohio St. 95, 160 N. E. 623 (1928); *Stoner* v. *Underseth*, 85 Mont. 11, 277 P. 437 (1929); *Marshall* v. *Public Service Commission*, 129 Pa. S. 272, 195A. 475 (1937); *In re Riss and Co., Inc.* (Colo. P. U. C.), 9 PUR (NS) 331 (1934); *Hopke Freight Forwarder Application*, 265 I. C. C. 726 (1950) (affirmed in mimeograph opinion dated October 1, 1951); *Terminal Taxicab Co.* v. *Dist. of Col.*, 241 U. S. 252 (1916).

[14] *Producers Transp. Co.* v. *R. R. Comm.*, 251 U. S. 228 (1920); *Fordham Bus Corporation* v. *United States*, 41 F. Supp. 712; *Smitherman & McDonald* v. *Mansfield Hardwood Lumber Company*, *supra*.

[15] *Grolbert* v. *Board of Railroad Comrs. of State of Iowa*, *supra*.

operates a continuing service of a highly specialized nature and it invariably refuses service to almost everyone who applies for it, and the service is definitely limited to an individual or a particular few individuals who contract with the carrier for it, the carrier may be a private carrier for hire.[16]

It is apparent from these cases that before a carrier may enjoy the status of a private carrier it must meet the above-mentioned primary tests of private carriage. It is equally apparent that the more contracts and the more patrons a carrier has, the greater is the likelihood that it may be a common carrier. As may be seen from the discussion that follows and cases cited, the law of common carriage applies with equal force to transportation associations as it does to any other class or group of shippers.

An analysis of Bay Area's operations leaves little room for doubt that this Respondent's service is being held out to the public. First of all it is noted that neither its articles of association nor its bylaws contain any limitation on membership in Bay Area. The articles and bylaws do not restrict membership to flower shippers or limit its services to members and they contain no requirement for the payment of dues or contributions to Bay Area's operating expenses. Being unrestricted in these respects Bay Area could expand its operation to include not only all of the flower shippers and other members of the shipping public in the San Francisco area but to shippers in other West Coast cities as well. If this were to happen it could seriously affect the operations of the regulated air freight forwarders and impair the Board's regulatory power over a substantial portion of the air freight forwarder industry. Both prior to

[16] *Ace High Dresses* v. *J. C. Trucking Co.*, 122 Conn. 578, 191A. 536 (1937).

and subsequent to incorporation new members were solicited for Bay Area from among the flower shippers in the San Francisco area by Mr. Reynolds and Mr. and Mrs. Decia, and later by Barulich for the express purpose of increasing the volume of Bay Area shipments in order to obtain lower air freight rates. A number of nonmember shippers testified that they had been solicited for membership and several Bay Area officers, including Barulich, testified that any flower shipper in that area was eligible for membership and that no application for membership has ever been refused. At a meeting of the Bay Area members held August 12, 1949, the directors were instructed to accept any shipper in the Bay Area consolidation for the purpose of obtaining lower air freight rates. As of the time of hearing Bay Area had 26 members in good standing out of a maximum of 225 flower shippers in that area and no member had been expelled until October 24, 1951, when four were separated for nonpayment of annual dues.

In addition to providing service for its member shippers Bay Area also ships flowers to some 750 wholesale florists located in various cities in the United States and Canada. The evidence reflects a concerted effort on the part of this Respondent to expand its service to other shippers and receivers through advertising and by urging its consignees to insist on having their flowers routed via Bay Area. In corresponding with consignees Barulich would invariably close his letters with the following or similar admonition, "For the best of service and the lowest charges insist that your flowers are routed via 'Bay Area' (no extra charge or hidden fees)". A number of member and nonmember shippers testified to having received requests from their consignees to ship their flowers through Bay Area. In addition

Bay Area's name was changed for advertising purposes and it paid the expenses of having its name painted in large letters and prominently displayed on Barulich's trucks which made daily pickups of shipments throughout the San Francisco area. Other media of advertising and a solicitation consisted of placing Bay Area advertising labels on member shipments and active solicitation of new members and receivers by both Respondent's officers and members.

An exhibit was submitted by Bay Area disclosing that during the last six months of 1951 approximately 68 percent of its shipments involved consignment sales. The purpose of this exhibit was to disprove the holding out of service by Bay Area to the consignees by showing that the member shippers rather than the consignees bear the burden of the transportation charges with respect to the vast majority of the shipments for which reason Respondents conclude the consignees could not be held to be purchasers of Bay Area's service. The logic of this distinction is not readily apparent for it may be assumed that regardless of how a commodity is shipped whether on consignment, direct, or prepaid, the transportation charges are ultimately reflected in the purchase price paid by the consumer and for this reason it would appear immaterial who pays the freight charges. However, the evidence in this case establishes that the bulk of Bay Area's shipments are sent "collect" irrespective of whether they involve consignment or direct sales. When the shipments are received at destination the consignees pay the break-bulk agent, and he pays the airline which in turn remits the advance charges to Bay Area. It is apparent from these facts that the consignees pay the transportation charges in the first instance, including the Bay Area advance charges, and such being the case Respondents'

contention to the contrary is without merit and is therefore rejected. Accordingly, since the weight of authority holds that such consignees are purchasers of the transportation service,[17] it is concluded that these 750 consignees are members of the air shipping public to which Bay Area has held out its service.

Considering next the question of what constitutes the public insofar as Bay Area is concerned it has been found from a review of the various authorities on the subject that the term itself has a well-defined meaning.[18] The term "public" insofar as it relates to carriage does not necessarily mean the entire nation or even an entire industry but by comparison may be either a large or small or a broad or narrow segment of the general public depending upon the activity engaged in by the carrier and the portion of the market encompassed by that activity which he serves. Thus, on the basis of the decisions in the above-cited cases Bay Area's public comprises that part of the air shipping public who ship and receive flowers and decorative greens by air. As indicated previously Bay Area now serves a substantial number of flower shippers and receivers and potentially its service could include all of the shippers in the San Francisco and adjoining areas and a substantial number of the eastern consignees. Even if it were found that Bay Area's service is actually available to only one of two above-mentioned groups, either group represents a substantial part of the air shipping public and in either case Respondent's service would be available to the public. The logic of this conclusion is more readily apparent when it is considered that

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[17] *Doughty-McDonald Grocery Co.* v. *A. T. & S. F. Ry. Co.*, 155 I. C. C. 47 (1929); *Adams* v. *Mills*, 286 U. S. 397 (1932).

[18] *Terminal Taxicab Co.* v. *Dist. of Col.*, *supra; Anderson* v. *Fidelity & Casualty Co.*, 228 N. Y. 475, 127 N. E. 584 (1930).

in 1951 Bay Area shipped 60,000 boxes of flowers and greens weighing approximately 40 pounds each to eastern consignees. It can hardly be disputed that such large scale shipping even when spread over the course of a year would account for a considerable portion of the useable cargo space on planes destined to eastern points and that potentially even a greater amount of space would be required if Bay Area were to expand its operations to a greater number of shippers and consignees.

Insofar as Bay Area association itself is concerned it is significant that the sole interest of the members is in securing the lowest possible air-freight rates for transportation of their flowers to eastern markets. The Bay Area members are competitors to each other in the sale of flowers and retain *ownership in the shipments until they* are delivered to the consignees. Several Bay Area officers and members testified that Bay Area's rates were from $1 to $2.50 per box less than those of Airborne and stated that their margin of profit on flowers is so small that in many cases it amounts to no more than the savings in air freight costs and that the continuance of Bay Area's service is essential to the retention of their eastern markets. While it may be conceded that some shippers would suffer as a result of being deprived of Respondents' service it must be recognized that this fact alone would not justify the continuance of a service which, unless authorized by the Board, would be illegal. The record discloses that the forwarding operation of Bay Area is not incidental to any other business activity in which it engages. Bay Area does not acquire title to the merchandise received from its members but rather each shipment is individually owned and ultimately each individual shipper or consignee and not Bay Area pays the air freight charges. In these

respects the activities of Bay Area are distinguishable from those of agricultural cooperative associations where the commodities of the several members are commingled into a common mass and where title is relinquished to the association, and the transportation is only incidental to association's main business of growing, marketing, and distributing of agricultural commodities.[19]

It is concluded from the foregoing that Bay Area's operations are characterized by all of the elements indicative of a holding out of service to the public.

Bay Area contends that it is a nonprofit corporation and in support thereof alludes to its articles of association which prohibits the corporation and its members from profiting from its activities. The Enforcement Attorney on the other hand contends that Bay Area is a common carrier regardless of whether it does or does not operate at a profit.

Sections 1 (10) (21) of the Act define air transportation as "* * * the carriage by aircraft of persons or property (in interstate commerce) as a common carrier for compensation or hire * * *," but the term "Compensation or hire" is not defined in the Act. The word "compensation" has been construed by the Interstate Commerce Commission and the courts as meaning a payment for service which does not necessarily include an element of profit,[20] whereas the word "hire" does. The *Schenley* case cited below held that a Schenley subsidiary which performed an

[19] See *McMurray Transportation Service* v. *Burchardi*, 40 C. R. C. R. 403 (1937); *J. Nelson Kagarise*, 42 C. R. C. R. 675 (1940).

[20] *Schenley Contract Carrier Application*, 44 M. C. C. 171 (1944); *Schenley Distillers Corp.* v. *U. S.*, 61 F. S. 981 (1944) (affirmed in 326 U. S. 432 (1946); *Enterprise Trucking Co.*, 2 M. C. C. 264 (1941); *Mountain States Telephone and Telegraph Co.* v. *Project Mutual Telephone and Electric Co.*, P. U. R. 1916 F. 370. (Idaho P. U. C. 1916).

exclusive trucking service for the parent and affiliated Schenley companies was subject to regulation by the Interstate Commerce Commission as a contract carrier as having performed service for compensation even though it was reimbursed by its parent and affiliates for only operating expenses. Bay Area derives its revenues from the sale of manifests, annual dues and from its share of the advance charges on member shipments. The income thus obtained is designed to meet Bay Area's operating expenses including legal fees occasioned by this proceeding and other litigation. The above-cited cases are persuasive of the fact that its services are performed for compensation.

* * * Respondent urges that as a nonprofit association it would be exempt from regulation by the Board under the decision of the Interstate Commerce Commission in the *Barre Granite* case.[21] In support of its claim of applicability of the latter case to this proceeding reference was made by Bay Area to the Board's opinion in the *Air Freight Forwarder* case,[22] and subsequent decisions, in which the Board allegedly adopted in its definition of a freight forwarder by air, the same tenets and limitations prescribed by the Interstate Commerce Commission in Part IV of the Interstate Commerce Act.[23] By this reference Bay

[21] Barre Granite Association, Inc., F. F. Application, 265 I. C. C. 637 (1949).

[22] 9 C. A. B. 473 (1948).

[23] Section 402 (a) (49 U. S. C. 1002).

The specific language of the air freight forwarder case referred to is as follows:

"While express operations date back to the stage coach era of surface transportation in America, the freight forwarders did not come into being until after the advent of the railroad and did not develop fully until the early years of this century. They were first placed under regulation in 1942 when Congress en-

Area implies that since Part 296.1 of the Economic Regulations is patterned after section 402 (a) of the Interstate Commerce Act, the Board in deciding like questions under Part 296 is under a duty to follow the decisions of the Commission and courts in cases arising under aforesaid section 402 (a) irrespective of the positive exemption granted certain classes of shippers and nonprofit associations under section 402 (c) of such Act.

In answering this contention it is not necessary to go beyond the language of section 1 (2) of the Civil Aeronautics Act itself which vests in the Board a broad power of exemption over indirect air carriers without any condition or limitation as to how that power shall be exercised. It is obvious from its language that Congress in writing this provision into the Act intended that the Board should have a broad discretion in exercising its authority thereunder and that it should not be restrained in any manner whatever in its determination in a particular case of whether an exemption should be granted. It is significant that to date the Board has never exercised its discretion to the extent of granting nonprofit shippers

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acted Part IV of the Interstate Commerce Act, which defines and specifically provides for the regulation of surface freight forwarders. The term 'freight forwarder' is used loosely in common parlance to cover a wide variety of activities in connection with the handling of freight but will be used here in its strictly technical sense, following the specific characteristics of a forwarder as set forth in Part IV of the Interstate Commerce Act. A surface forwarder holds himself out to the general public as a transporter for compensation, of property in interstate commerce assuming responsibility for the same from point of receipt to point of ultimate destination; he assembles and consolidates that property into bulk shipments which, at some terminal point, he breaks up and distributes; he uses the services of an underlying carrier for the whole or some part of the transportation of such shipments."

or associations exemptions from the provisions of the Civil Aeronautics Act, such as is contemplated by section 402 (c) of the Interstate Commerce Act.[24] Accordingly, * * * Bay Area * * * could not avoid regulation by the Board for section 402 (c) of the Interstate Commerce Act has no counterpart either in the Civil Aeronautics Act or the Board's Economic Regulations.

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On the basis of the foregoing facts and considerations it is concluded that Bay Area holds itself out to the public as a common carrier to provide transportation of property for compensation * * *.

* * * * *

Order No. E–7139

UNITED STATES OF AMERICA
CIVIL AERONAUTICS BOARD
WASHINGTON, D. C.

Adopted by the Civil Aeronautics Board at its office in Washington, D. C., on the 5th day of February 1953

[24] Section 402 (c) reads as follows: "The provisions of this part (Part IV) shall not be construed to apply (1) to the operations of a shipper, or a group or association of shippers, in consolidating and distributing freight for themselves or for the members thereof, on a nonprofit basis, for the purpose of securing the benefits of carload, truckload, or other volume rates, or (2) to the operations of a warehouseman or other shippers' agent, in consolidating or distributing pool cars, whose services and responsibilities to shippers in connection with such operations are confined to the terminal area in which such operations are performed."

Docket No. 4902, et al.

IN THE MATTER OF CONSOLIDATED FLOWER SHIPMENTS, INC.—BAY AREA, ET AL.

Order

A full public hearing having been held in the above-entitled proceeding and the Board, upon consideration of the record, having issued its opinion containing its findings, conclusions and decision, which is attached hereto and made a part hereof;

Upon the basis of such opinion and the entire record herein, and under the authority contained in sections 205 (a) and 1002 (c) of the Civil Aeronautics Act of 1938, as amended;

It is ordered that:

1. Consolidated Flower Shipments, Inc.—Bay Area, its successors and assigns, and John C. Barulich, its executive secretary, and its officers, directors, agents and representatives cease and desist from engaging indirectly in air transportation in violation of section 401 (a) of the Act;

2. This proceeding, insofar as it relates to William Zappettini, other than in his capacity as officer and director of Consolidated Flower Shipments, Inc.—Bay Area, be and it hereby is dismissed.

3. This order shall become effective 12:01 a. m., on March 7, 1953.

By the Civil Aeronautics Board:

[SEAL] (S) Fred A. Toombs,
FRED A. TOOMBS,
Acting Secretary.

U. S. GOVERNMENT PRINTING OFFICE: 1954